IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

STEVE BULLOCK, in his official capacity as Governor of Montana, et al., Plaintiff, vs. BUREAU OF LAND MANAGEMENT, et al., Defendant.	Civil Docket No. CV-20-62-GF-BMM Court of Appeals No. 20-36129

Transcript of Motion Hearing

Missouri River Federal Courthouse
125 Central Avenue West
Great Falls, MT 59404
Monday, September 21, 2020
1:30 p.m. to 2:50 p.m.

BEFORE THE HONORABLE BRIAN MORRIS

UNITED STATES CHIEF DISTRICT COURT JUDGE

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Proceedings remotely recorded by machine shorthand
Transcript produced by computer-assisted transcription

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PRESENT ON BEHALF OF THE DEFENDANTS:

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ALSO PRESENT:

Patrick Holmes (via video)
Unidentified member of the public (via video)

PROCEEDINGS

(Open court.)

THE COURT: Please be seated.

Madam Clerk, please call the next case on the Court's calendar.

THE CLERK: This Court will now conduct a motion hearing in Cause Number CV-20-62-GF-BMM, Bullock, et al. versus Bureau of Land Management, et al.

THE COURT: Good afternoon, Mr. Gupta.

MR. GUPTA: Yes, Your Honor. Deepak Gupta for Governor Bullock and the Montana Department of Natural Resources and Conservation. I'm joined by my colleagues Ralph Graybill, Rylee Sommer-Flanagan, and Neil Sawhney. And I will be speaking as well as my colleague Mr. Sawhney. I believe Mr. Graybill will start out with an introduction.

THE COURT: All right. And good afternoon, Mr. Zee.

MR. ZEE: Good afternoon, Your Honor, Andrew Zee from civil division of the Department of -- (video distortion.)

THE COURT: I'm sorry, Mr. Zee. You cut out at the end, sir. Mr. Zee?

MR. ZEE: I'm sorry, Your Honor.

THE COURT: You cut out at the end. You just made your appearance, I assume. Correct?

MR. ZEE: Yes, Your Honor.

THE COURT: Okay. And who else is on the screen

here, Mr. Gupta?

MR. GUPTA: Mr. Sawhney from my firm, Neil Sawhney, who will be speaking.

THE COURT: All right. So we're conducting this hearing by Zoom, and there's a great deal of interest in some circles. I know people are listening in. I'd ask anyone who is not involved in the case directly to please mute their microphones at this point.

I'd also ask -- Mr. Zee, if you wouldn't mind muting for now, and I'll unmute you in a few minutes when it's your turn to speak.

Mr. Gupta, are you going to handle the whole argument?

MR. GUPTA: If it's okay with Your Honor, we'd like to divide the presentation. I would be dealing with the Article III standing issues, and my colleague, Mr. Sawhney, will address the remaining issues, the merits issues.

THE COURT: All right. And Mr. Graybill will do the introduction?

MR. GRAYBILL: Your Honor --

THE COURT: Hold on.

Mr. Gupta, is Mr. Graybill going to do introductions?

MR. GUPTA: I think I basically said what Mr. Graybill was going to say. He was just going to introduce all of us and explain the division of labor to Your Honor.

THE COURT: All right. Can everyone hear me okay before we get started?

(Simultaneous affirmative response.)

THE COURT: Sometimes there's a transition delay. So if I'm going to ask a question, I'll just interject your name and pause. If your hear your name being called, please stop speaking, and then I will pose the question after you've stopped speaking. That way we can avoid speaking over each other.

We have a court reporter making a transcript of this proceeding. Like any other in-person hearing, you will have a written record of what happened, assuming we follow the rules and speak one person at a time. We will not have any copy of the video transmission of this proceeding.

So if you are not speaking now, please mute your microphones, and we'll recognize Mr. Gupta on behalf of Governor Bullock.

MR. GUPTA: Thank you, Your Honor. Deepak Gupta for the governor. As I said, I will be addressing just the Article III standing issues. And we believe the Justice Department's challenge to our Article III standing suffers from three basic errors.

First, the DOJ fundamentally misunderstands how Article III standing analysis works in the Appointments Clause and separation of powers context, as reflected in the most

recent and applicable Supreme Court and Ninth Circuit precedent. And I particularly call your attention to the *Seila* law case, the *Free Enterprise* case, and the Ninth Circuit's decision in *California v Trump*.

Second, we believe the DOJ ignores the special solicitude that the Supreme Court and the Ninth Circuit have accorded states in the standing analysis, particularly in this precise context in challenges to federal government action or inaction that has an impact on the state's land or environment. And I particularly call the Court's attention to *Massachusetts v EPA*, and, again, the recent decision in *California v Trump*.

And, third, last but not least, DOJ all but ignores the significance of the most important facts, including the fact that on August 4th, after this lawsuit was filed, Mr. Pendley himself, exercising authority that only the BLM director lawfully possesses, provided the necessary formal approval for two long-term Resource Management Plans for Montana. These plans are part of a long term ongoing process in which Montana by statute has a recognized stake, and they govern land management decisions on more than 800,000 acres of surface public lands in Montana and more than 1.4 million acres of sub-surface mineral estates in Western and Central Montana for the next 20 years.

So I'd like to start with the first point, but I'm happy to answer any specific questions that the Court has. And

that has to do with -- the first point is how Article III standing analysis works in the separation of powers context. And I think if I had to characterize the DOJ's arguments in a nutshell, the problem is that they approached this case as if it were a conventional environmental case, an APA case, where someone is coming forward and, let's say, a private plaintiff, and is changing some specific action because of a garden-variety violation of federal law.

That's not what this case is. This case falls into the kind of framework that the Supreme Court has addressed in most recently in *Seila Law v Consumer Financial Protection Bureau*, and then a few years before that, the *Free Enterprise* case, where what the plaintiff is alleging is that the decision-maker, the governmental decision-maker, lacks lawful authority to make any decisions as part of a process or where, as it was the case in the *Seila Law* case, the argument is that the agency itself is unlawfully structured. In those kinds of cases, the standing analysis works differently.

And what the Supreme Court made very clear in *Seila Law* is that we don't put the plaintiff in a case like that to the impossible burden of trying to show a counterfactual, that but for this improperly appointed official or improperly constituted agency, that the policy outcome or the process that the litigant is being subjected to would come out differently. Because, first of all, that's going to be an impossible

showing, and because the real injury in a case like this is being subjected to a process in which you have a stake and in which the decision-maker doesn't have authority.

So we think the injuries here are quite substantial in concrete terms, and I'm happy to get to those. But I first think, just by way of comparison, it's worth looking at the Supreme Court's decision in *Free Enterprise*. There, there was an Appointments Clause challenge to this public accounting board, and the accounting firm that brought the challenge where the Supreme Court held that there was standing was at the very beginning of a process. Nothing had happened to them other than the initialization of an investigation.

Now, normally, you can't challenge the initiation of an investigation. You challenge a particular final agency action at the end of the process. So that shows you that the framework for these kinds of challenges is different.

Now, here, we actually do have a substantial ongoing process that has produced final agency action, but that's not the end of it. The process is ongoing. And so if you look at the Holmes and Williams declarations, what they explain is that there's an -- and I know Your Honor has some familiarity with the background from previous litigation in this Court about Resource Management Plans regarding Sage-Grouse. But this is a very important issue that affects land management in the state of Montana. And the statutory scheme recognizes that the

states that are affected have a stake in that process, and that's why the governor of the state can perform what's called a consistency review and raise objections. The states have special status in that process. And that's precisely what Governor Bullock did. He objected to the proposed oil and gas leasing availability in his consistency review in April. He called for additional protective stipulations. And this is very important. He requested full consultation with the Montana Fish and Wildlife agency as part of BLM's authorization of any surface-disturbing activities.

And as the Williams declaration explains -- I'd just call your attention to paragraph 12 -- under Bureau's new plans, that's not going to happen. The Bureau is going to approve any surface disturbance or occupancy plan with mere notification to the state rather than consultation with the state.

So that shows you that the approval of this plan sets in motion a years' long process with direct concrete effects to Montana's land and its ability to protect wildlife in the state, and it's an ongoing process. And it's an ongoing process that therefore works ongoing harm to the state in the form of Montana having to interface with the decision-maker who does not have the lawful authority and --

THE COURT: Mr. Gupta.

MR. GUPTA: -- standing he'd assume merit.

THE COURT: Mr. Gupta, how do you distinguish the notification from consultation? Are those terms of art, or is that just everyday meaning?

MR. GUPTA: Yeah, I mean, I think it's not different from the everyday meaning. So if I tell you, you know, I'm going to do something, that's notification. Consultation requires more than that. It requires input from you. If I say I'm going to consult with you, I'm not just telling you what I'm going to do. I at least -- you know, presumably, I'm going to ask you what you think and take that into account, and there's a process for that.

And so I think that shows that, you know, this is an ongoing process. The declarations bear that out. There are officials in the State of Montana and these departments that are interfacing with BLM on a daily -- certainly weekly basis, and I believe daily basis, on these issues that are critical to management of land in Montana. BLM controls a third of the land in Montana. And as I was discussing earlier, there are millions of acres that are affected by these plans.

So even if you just take the ordinary standing analysis that would apply to a private party, we have far more Article III injury, far more at stake than in cases where the Supreme Court has recently recognized standing in separation of powers challenges, but there's --

THE COURT: Mr. Gupta, so are you alleging more than

a procedural injury? Is there an injury in fact to an interest of Montana here? Or is this speculation of what could happen down the road if, for example, the change in the Sage-Grouse leasing results in destruction of Sage-Grouse habitat that could result in more attention to Sage-Grouse in the future and possibly ESA listing? Is that concrete injury or speculative?

MR. GUPTA: Well, certainly not just speculative injury. It's concrete injury.

And I just -- I want to you -- you asked if it was procedural injury, and I think the courts haven't quite called it procedural injury. But if you look at the separation of powers and Appointments Clause cases, it's very analogous. What those cases are saying is if you have a stake in the process and you're alleging that the decision-maker is unlawfully appointed, shouldn't even be allowed to make those decisions, so long as you can show an article of stake in the process -- you still have to show that you have a concrete stake -- then that is sufficient for Article III injury. You don't have to prove that the process would have produced some different outcome.

But, here, we have a lot more than a mere procedural injury because Montana has actually been engaging in this process for quite some time and laid the objections that I described. Those objections have been rejected, and Montana is now going to have to continue to engage with the BLM, with an

improperly constituted official at the helm.

And it's very important to emphasis -- and I know my colleague, Mr. Sawhney, will be talking more about this when we get to the merits. It's important to emphasis that the particular decision at issue here, the decision to reject a protest when it comes to these Resource Management Plans is a decision that is vested in solely by law in the BLM director. The director has to perform that action, and the director performed that action here, with the acting director.

And if the process were reopened, if Montana were to say, "Look, we don't like the way you're going with this. We have additional protests. We want you to decide that." The problem is that this is an ongoing issue. It's an ongoing issue that the person who will be making that decision doesn't have the lawful authority to do so.

Just as it would be in the *Free Enterprise* case, that was an ongoing process where the allegation was that the agency officials were not properly appointed under the Constitution, and the process was, therefore, flawed. And any decision made by a decision-maker who's been unlawfully appointed in violation of the Appointments Clause is void *ab initio*. And so that's why you have this kind of framework for these challenges.

I hope I'm answering your question, Your Honor. It's that it is akin to a kind of procedural injury. We also have

concrete injuries that have occurred and that are ongoing. But I would not describe what's going on here as merely speculative. And I think to the extent that my friend on the other side is saying it's speculative because you can't show what would happen in a counterfactual world, that's precisely what the Supreme Court has said you don't have to do in a separation of powers challenge.

THE COURT: Mr. Gupta, in the recent decisions in *Cuccinelli* and *Wolf*, Court focused on injury to particular people who were parties to the case. I think it's in *Cuccinelli* that said there was no organizational standing but the individuals had standing. How do you apply that reasoning to this case, the reasoning of those two courts?

MR. GUPTA: Well, I mean, those cases are not at all inconsistent. I think in the Cuccinelli case, if I recall correctly, it was an individual immigrant. I don't remember the particular situation, but it was a more conventional kind of challenge where you just have a particular person who is aggrieved in a specific way. And, certainly, that can suffice in an Appointments Clause challenge, and that's the way that case was set up.

Here, if this were -- if you were to assess this case using the -- if you were to throw out what the Supreme Court has said about the specifics about how standing works in separation of powers cases, we'd still have standing, I think,

because we have submitted ourselves, and we have a stake in this process. It affects millions of acres of our land, and the decision-maker has rendered an adverse decision, and we're going to continue to have to be part of that process.

You know, I think it's useful to compare the injuries here with the injury in *Massachusetts v EPA*, because I think the comparison is quite favorable for us. In *Massachusetts v EPA*, the EPA hadn't done anything yet. What Massachusetts was complaining about was that the EPA hadn't initiated a rulemaking on greenhouse gases. And the Supreme Court acknowledged that any harm there was remote. The harm would have been the harm once the levels rise as a result of greenhouse gasses to Massachusetts's coastline, to its land.

But the Supreme Court said particularly because we afford special solicitude to the states when they're protecting their land and air and their domain, we're going to allow the states to bring a challenge like this. Because the injury, while remote, is significant, and there's a causal connection, and it would be redressable.

Well, here, you don't have to speculate. The injury is not remote. We have identified in our protests what the problems are with the BLM's approach, and the BLM has taken a 180-degree approach in its management to public lands from what was reflected just a few years ago in the BLM's plans. And so the harm to Montana's land management and wildlife and to its

public lands is much more acute -- much more imminent than it was in *Massachusetts v EPA*.

And I think the same thing is true if you look at the Ninth Circuit's decision in *California v Trump*. That was a decision by Judge Thomas for the Ninth Circuit, a recent decision, in which California and New Mexico were challenging the funding for the border wall. And so you did have a kind of separation of powers aspect to the challenge, which the Court acknowledged. It acknowledged the special role of the states in vindicating the separation of powers.

But it also leaned heavily on *Massachusetts v EPA* and the special solicitude that the states have in protecting their environment. And, there, there were particular species, just as here you have the Sage-Grouse. There, there were particular species that California and New Mexico identified whose habitats would be disrupted if the administration were allowed to continue with this wall and effectively separate those animals that were on the Mexican side or the US side of the border. And that interest was deemed sufficient to show Article III standing there.

Again, I think that the situation here is more acute and a lot less remote than it was in those two cases.

THE COURT: Mr. Gupta, so setting aside for the moment the special solicitude for states, what's your strongest argument for standing in a case to support that?

MR. GUPTA: I think if you set aside the special solicitude, I think our strongest -- first of all, I think *California v Trump* is important even if you set aside special solicitude. But I would say -- I would take a look at *Seila Law*, the CFPB case. And what the Court said there is a litigant challenging governmental action as a void on the basis of separation of powers is not required to prove that the government's course of conduct would have been different in a counterfactual world in which the government had acted with constitutional authority.

And the Court there, the Supreme Court, cited *Free Enterprise*. And, again, I've already discussed *Free Enterprise*. The discussion at this point in *Free Enterprise* is not lengthy. The DC Circuit decision discusses it more, but the facts were pretty simple. You had an accounting firm that the mere fact that they were at the initial stages of an investigation, that an investigation was open, was considered sufficient by the Supreme Court because of the nature of the challenge. Because you're subjected to a decision-maker that you allege is unlawful.

And our reply brief sets out, I think, a long line of cases going back to the Supreme Court's decision in *Freytag*. It also commended the DC Circuit's decision in *Landry* to you, where the Court makes clear that standing works a little bit differently in a case like this. In a way you can think of it

as the right that we are asserting is the right to have any decisions made with respect to us made by somebody who actually has the authority to make that decision. And so every day that we are being subjected to a process that is in our view unconstitutional, it's tainted with the unconstitutionality of this appointment, is the harm to Montana and its sovereign interests and its ability to protect its wildlife. And this is not a small matter. It's a matter that affects millions of acres. It affects oil and gas leasing throughout the state and affects the ability of the state to protect its air, its wildlife, and the use of its public lands.

THE COURT: Anything else, Mr. Gupta?

MR. GUPTA: No. Thank you, Your Honor. I'm happy to turn it over to --

THE COURT: All right. Thank you for your time.

So now we'll hear from Mr. -- is it "Sawhney"? Did I say that correctly?

MR. SAWHNEY: Yes, Your Honor.

THE COURT: -- Mr. Sawhney regarding the merits of the state claim.

MR. SAWHNEY: Yes, Your Honor, Neil Sawhney, also on behalf of Governor Bullock and the Department of Natural Resources.

Your Honor, on the merits, it's hard to imagine a more stark violation of the Appointments Clause. There has

been no confirmed bureau director since January of 2017. Instead, the individuals exercising that -- occupying that roll have served as a result of unilateral appointments made wholly within the executive branch and not in compliance with the requirements and procedures set out by Congress in the federal Vacancy Reform Act.

Mr. Pendley's continued service is even more egregious than his predecessors. He has served for more than a year, and he currently derives his authority from a succession order that he himself authored and that has no expiration date. Even more, he has continued to serve even though his name was submitted to the Senate and then withdrawn by the President in light of bipartisan opposition.

What you have here, Your Honor, is exactly the case that presents the concern that Justice Thomas raised in his concurrence in *Southwest General*, and that is that the executive branch will use temporary appointments as a, quote, "end run" around the Appointments Clause. And the government's position, if accepted by the courts, creates a template for the executive branch to effectively sideline the Senate's advice and consent for the entirety of a presidential term moving forward.

And so, Your Honor, I was going to start with, you know, a recognition that both the Supreme Court and Congress have evidenced that even though the Appointment Clause requires

individuals serving as agency heads to be confirmed by the Senate, there's always been a recognition that that has to be balanced with some practical necessity of functioning government in the case of vacancies when they arise.

But the way that the political branches have achieved that balance is since the founding of the republic, Congress has enacted specific legislation that sets out specific requirements and procedures by which the executive branch must undertake in order to fill these temporary vacancies. And so long as the government's -- the executive branch's appointment of such temporary officials is only constitutional when they follow those requirements and procedures.

But remarkably here, the federal government does not even attempt to argue that Mr. Pendley's appointment complies or in any other way kind of adheres to the requirements set out in the FVRA. In fact, they fault us for bringing up the FVRA in the first place.

And even though we're only bringing -- we're bringing a sole constitutional claim under the Appointments Clause, the FVRA is critical to understanding kind of the interrelationship between Congress and the Executive branch in this area. And, here, I think we agree with the federal government that *Eaton*, the Supreme Court's decision in the late 1800s, is a useful place to start, though we quite disagree with their interpretation of the language in *Eaton*.

So I think the key sentence in *Eaton* is that -- is this sentence by the Court at 343 of the opinion, the Court said, "Because the subordinate officer is charged with the performance of the duty of the supervisor for a limited time and under special and temporary conditions, he is not thereby transformed into the supervisor and permanent official."

And so both of those clauses are critical to understanding what allows a temporary appointment to be constitutional. It's that it's for a limited time and that the temporary official is serving under special and temporary conditions. And in that case, the those conditions were set out by Congress itself in a statute governing the appointment of consuls, vice consuls, and delegating some authority to the President in the event of a vacancy.

And that is exactly what Congress did in the FVRA. They created a carefully calibrated statutory scheme that allows for temporary appointments under, you know, certain timelines that are set out in 3346, and under certain conditions. Right? Only certain people may be appointed for these temporary acting roles.

But Mr. Pendley's appointment satisfies neither of those elements. Right? Mr. Pendley's appointment is essentially indefinite. It would continue until the end of this presidential term or beyond. There is no end date on Mr. Pendley's service. Moreover, Mr. Pendley is not serving

subject to any conditions set by Congress.

THE COURT: Mr. Sawhney, what effect does the withdrawal of the President of Mr. Pendley's name as the director have on this case?

MR. SAWHNEY: Your Honor, the withdraw makes only more clear how egregious Mr. Pendley's appointment is and how much it is -- it is violating or aggrandizing the power from the Senate.

And I think here, the Supreme Court's decision in *Southwest General* is quite instructive. So in describing the history of the Vacancies Act, the Supreme Court discussed how in the 1970s and '80s the Department of Justice had the view that the Executive branch had independent authority without Congress's involvement to appoint temporary officers when vacancies arose.

And the Supreme Court pointed particularly to a specific incident when the Department of Justice had nominated an individual for Acting Assistant Attorney General and that nominee was rejected by the Senate, and then the Department of Justice installed this person as director, you know -- sorry -- as Acting Assistant Attorney General despite the Senate's rejection. And the Supreme Court made clear in *Southwest General* that Congress passed the Federal Vacancies Reform Act to make clear to the Executive branch that that was not permissible under the Appointments Clause; that that was, in

fact, the most egregious action under the Appointments Clause because it was not only disregarding the Senate's advice and consent role, but it was actually flouting it. Right? The Senate had not given its advice and consent to a nominee, and yet the Executive branch continued to instill that acting official.

Now, here, you know, Mr. Pendley was not rejected by the Senate because the government withdrew his name before it reached the floor. But the same constitutional values are present in this case. Because the withdrawal of Mr. Pendley's name makes only more clear that the government is not intending to go through the regular process of confirming him through the Senate. And his service is just kind of illustrative of what could happen if the courts accepted the Executive branch's expansive theory of their power to make appointments without Congress's involvement.

And, Your Honor, I think another thing I think is important to recognize about *Eaton*, is that in *Eaton* the vacancy arose because the consul became ill, and that was very central to the Supreme Court's decision and has been kind of animating a lot of the Congress's legislation on vacancies. That the idea that a vacancy arising and because of the extrinsicies of government, the Executive branch needs someone who can temporarily fill that position to continue the agency's functioning.

But, here, we have the opposite of that circumstance. Right? From the beginning of this presidential term, there has been no confirmed director, and the vacancy has been maintained by the Executive branch. There is no sight of the vacancy ending absent this Court's intervention.

Your Honor, unless you have further questions on *Eaton* or the intersection between the Appointments Clause and the FVRA, I did want to address the federal government's argument that there is some sort of factual dispute here about Mr. Pendley's role, and we would submit that there's simply no genuine factual dispute at all, and there's three reasons for that.

So, first of all, the federal government does not contest and they could not contest that the White House, the Bureau, and even Mr. Pendley himself in public statements have described Mr. Pendley as the acting agency head and the leader of the Bureau. And in their brief, the government says that those were mistakes or made in error. But this has happened numerous times in public statements, and I would submit it is the clearest evidence to the Court that this is how both the agency, the Executive branch, and Mr. Pendley himself view Mr. Pendley's role at the Bureau.

Second, even though the federal government says that these statements were made in error, they provide no contrary evidence suggesting that Mr. Pendley has any other role except

for acting director. They did not file a Rule 66(d) motion suggesting they need more time to develop the evidence. What they call a factual dispute is really a dispute about the label for Mr. Pendley's service. So they argue he's not the acting director because we have never used those terms in the documents that gave him his authority. We didn't use the magic words of "acting director."

But neither the Appointments Clause nor the FVRA turns on the label that the Executive branch puts on an acting official because, otherwise, the Executive branch could completely evade the Appointments Clause just by not using the specific word "acting."

What matters is is Mr. Pendley exercising the power of the director of the Bureau of Land Management? And there's no question that he is. And I think the best evidence to that is, Your Honor, in the Department of Justice's brief, they concede at pages 14 to 15 of their opposition that Mr. Pendley formally resolved the protests to the Resource Management Plans. And as my colleague Mr. Gupta mentioned, that resolution of the protests is a critical step and a necessary step -- (video disruption) -- management plans, and it is a step and power that the statute and the regulations assign only to the director. So only the director or an acting director appointed lawfully may exercise that power to approve or deny or otherwise resolve protests to Resource Management Plans.

And there's just no dispute in this case that that's what Mr. Pendley did here. And so that on its own is a kind of undisputed evidence of Mr. Pendley's servicing as acting director.

And so I think for those three reasons, there's no need to even -- there's no reason to believe there's any factual dispute about Mr. Pendley's role.

And then, finally, Your Honor, I just want to briefly touch on the political question point. And, you know, we would submit that there's no merit to the argument that this case is nonjudicial. And so the argument is somewhat in tension with their reading of *Eaton* because the government itself admits that *Eaton* lays out a standard. Right? The standard is that the appointment must be for a limited time and under special and temporary conditions.

And so that language makes clear that the judiciary is equipped to evaluate when an appointment is trying to evade the time limits set out by the FVRA. And the FVRA's own time limits, which are set out in 3346, serve as a manageable standard by which the Court can view whether the appointment is constitutional or not.

So, Your Honor, unless you have any additional questions, we would ask that you grant the motion for summary judgment and issue the order that we proposed, along with the summary judgment motion.

THE COURT: All right. Thank you, Mr. Sawhney. I will allow you and Mr. Gupta to provide a brief rebuttal after Mr. Zee is finished. And if you'd mute your microphone for now.

MR. SAWHNEY: Thank you.

THE COURT: All right. Mr. Zee, are you ready to go, sir?

MR. ZEE: Yes, Your Honor. Thank you. Andrew Zee --

THE COURT: Whenever you are ready. I'm sorry.

MR. ZEE: Thank you, Your Honor. Andrew Zee from the Civil Division of the Department of Justice.

I would -- I will go ahead and proceed and respond to the arguments in the order that plaintiffs counsel presented them. But, first, I would just like to, at the outset, state that we are here on a quite unusual posture as the plaintiffs have brought a -- what they -- on an expedited motion for summary judgment with no claim of the typical -- (video disruption) -- harm that ordinarily accompanies a request for -- (video disruption).

THE COURT: Mr. Zee, we're having some difficulty hearing you, sir. Could you turn up your microphone perhaps, and can everyone else please mute your microphones if you are not speaking.

(Complying.)

THE COURT: All right. Whenever you are ready,

Mr. Zee.

MR. ZEE: I apologize, Your Honor. Is this clearer?

THE COURT: It is, yes. Thank you.

MR. ZEE: Okay. I'll endeavor to speak more loudly and clearly.

What I was saying, Your Honor, is that we are -- at the outset I would just like to point out that we are here in a quite unusual posture that plaintiffs served barely one month ago. Plaintiffs have brought what they have called an expedited motion for summary judgment yet have made no claim of the typical type of irreparable and imminent harm that must indeed accompany, as Your Honor is well aware, a request for expedited -- (video disruption) -- preliminary injunction. Indeed, we are here before the government has even had an opportunity to respond to the complaint under Rule 12 of the Rules of Civil Procedure.

So insofar as we have sought to respond to the standing deficiency in the complaint, we of course reserve our right -- (video disruption) -- additional argument if possible when the time comes for our -- (video disruption.)

(Court reporter requests Mr. Zee to speak into the microphone.)

MR. ZEE: With Your Honor's indulgence, let me attempt to use a headset.

THE COURT: Whatever works, Mr. Zee. Take a moment.

MR. ZEE: Thank you.

(Complying.)

MR. ZEE: Is that any better?

THE REPORTER: Yes. Thank you.

THE COURT: And, Mr. Zee, if we have difficulty in the future, I will interrupt so we can try to figure something out.

MR. ZEE: Thank you, Your Honor.

So I'm not sure how much of that the Court did or did not catch, but my basic point was that we are in a highly unusual posture in that the government has not yet had its time run to respond to the complaint, which was served barely a month ago, yet we are being made to respond to claims of mere ongoing harm, which, of course, do not rise -- plaintiffs make no claim to the sort of irreparable or imminent harm that must accompany a preliminary injunction motion.

So in our view, as we've presented in our papers, Your Honor, the reports -- the sound reports for this Court, given the posture that we find ourselves in, would be to defer ruling on the summary judgment until after the government has had an opportunity, under Rule 12, to present its threshold argument, which I believe, Your Honor, comes in a little under 30 days.

To respond to the arguments that plaintiffs' counsel have raised, I will take them in the sequence in which they

were presented and in which they were presented in the paper.

I think it's important, first, Your Honor, to note that the plaintiffs rely heavily on the special set of issues to which states are entitled, based on *Massachusetts v EPA* for this proposition, yet it's also important to note that the state here is not a plaintiff. The governor is a plaintiff. *Massachusetts v EPA*, *California v Trump*, none of these cases involve allegations for party plaintiffs that were the official in lieu of the state itself.

THE COURT: Mr. Zee, what's your understanding as to the difference? The caption says, "Steve Bullock, in his official capacity as governor of Montana." How is that different than the State of Montana?

MR. ZEE: Your Honor, I think -- well, I think it is different in the fact that the state is positioned to assert the interest of the state. I think that -- and I don't want to get too far ahead of a Rule 12 motion that might --

THE COURT: Mr. Zee, who would assert the interest of the state if not for the governor?

MR. ZEE: Your Honor, it may be that under provisions of state law the attorney general may be in a position to do that and authorized to do that. We're not saying that the governor cannot bring suit on his own behalf. What we are pointing out at this stage is that the governor's interest and the interest of the state --

THE COURT: Mr. Zee, under Montana's system of government, the attorney general and the governor are both elected officials. It's not uncommon that they come from different political parties, as is the case now. And, therefore, the attorney general oftentimes appears on behalf of the state. If the legislature passes a law that gets challenged, the attorney general typically defends. But in the event that the attorney general declines, the governor can step forward and defend the law on behalf of the state as well.

So I guess I'm not sure of the difference here you are trying to draw between *Massachusetts v EPA* and Steve Bullock in his official capacity as the governor of Montana.

MR. ZEE: Your Honor, all I'm merely pointing out is that state -- as the state is not the plaintiff. I certainly will defer to this Court's expertise on Montana state law, of course, over my own. We merely are pointing out the distinction between the party's plaintiff in this case and the parties in the cases on which they rely.

THE COURT: Okay. Mr. Zee, finish up on that point. Are you aware of a Court's decision that is distinguished between the state as a party receiving special solicitude and the governor acting in the official capacity not receiving special solicitude? I'm not aware of any cases. Can you point me to any?

MR. ZEE: At this time, Your Honor, I'm not aware of

any, but I'd reserve the right to present any to the extent we locate them in our Rule 12 reply.

THE COURT: All right.

MR. ZEE: So, Your Honor, responding to the standing argument first, the plaintiffs here, as we have construed the complaint and the evidence that has been submitted on summary judgment, cannot satisfy the fundamental injury in fact requirements of Article III. Their injuries are premised on a hypothetical injury that could flow from a future decision by a third-party agency that's not before the Court, that is, the listing of the Sage-Grouse under the Endangered Species Act. Blackletter law that such third-party intervening action are not sufficient to confer standing. It's -- plaintiffs don't even contest the proposition that the Bureau of Land Management itself has no power to list Sage-Grouse.

Further, Your Honor, we would point out that it's not even the listing of the Sage-Grouse that plaintiffs are alleging has caused them injury. It's the downstream effects of a listing of the Sage-Grouse. And there's a sort of double hypothetical contingency imbedded in the theory of injury that the plaintiffs are presenting here. Under the standard articulated in *Clapper*, the injury must be certainly impending, I think that this theory plainly fails.

Your Honor, there's also an additional injury that plaintiffs attempted to spell out in their summary judgment

papers which is the land use plan. Just at the outset, Your Honor, I would refute and contest counsel's suggestion that the government has ignored facts and ignored the finality. The fact is that when the plaintiffs pled the -- filed the complaint, those Resource Management Plans were not final. By the time they had filed their expedited motion for summary judgment, they were final. We acknowledged in our opposition brief, at pages 14 and 15, that the Resource Management Plans had in fact been final. So the suggestion in the reply brief that the government is somehow trying to ignore the finality of those plans is simply misplaced.

But, fundamentally, Your Honor, the plaintiffs have failed to articulate any concrete harm -- any viable state interest, propriety or otherwise, that is traceable to any particular provision or act in relation to the Resource Management Plan.

We heard today that -- we heard today Mr. Gupta point to certain unspecified protest resolution by the Bureau. But we still don't know, so far as we can tell, which particular protests have not been resolved to plaintiffs' satisfaction, and, moreover, what effect those protests resolutions have on what particular land interest or other sovereign interest that the plaintiffs allege. It's simply not identified.

Here, I direct the Court to the *Otter v Zinke* case or the *Western Exploration* case, which is cited in our opposition

papers that the proposition that even when the plaintiff is able to allege particular provisions of a Resource Management Plan -- which, again, there's no specific protest resolution. There's no specific provision of the plans that has been identified. Even when plaintiff does do so, that still is insufficient unless it's sufficiently linked to a cognizable and concrete injury to one of the state's propriety interest.

THE COURT: Mr. Zee, if a state didn't elect standing to challenge an acting director under the Appointments Clause, who would have standing?

MR. ZEE: Well, I think -- I think -- here, I would liken the -- I would liken the cases that plaintiffs counsel presented. So for instance in -- well, first of all, let's back up and answer Your Honor's question. We're not saying that the state cannot necessarily, as a matter of law, have standing. Our argument is that we cannot discern from plaintiffs' papers a cognizable, concrete, or certainly impending injury. That is a relevant fact. I want to make that point clear.

I would also like to distinguish the *Seila Law* and the *Free Enterprise Fund* decision that plaintiffs rely upon in the reply briefing. Those decisions -- in both of those decisions, Your Honor, the plaintiff was a direct target of either a government investigation or a government civil investigative demand from the defendant agency. Here, there's

no allegation that there is any investigation or direct regulation of a state of the same nature that was at issue in those cases. So I would submit, Your Honor, that the standing analysis is quite different.

Here, the plaintiffs, the governor, and the state agency are alleging -- are alleging not that they are being regulated by BLM, not that they are being investigated by BLM, or even that the BLM Resource Management Plans have some direct and immediate impact on them. Instead, they are alleging some further downstream contingent of fact on unspecified proprietary interest, economic interest, and so forth.

To the extent that the plaintiffs can articulate a connection between any particular provision of a plan and any sufficiently concrete interest, we would evaluate that under the relevant standard, Your Honor. But I think that on the current -- on the current and operative pleading, there's simply -- current and operative papers before the Court on summary judgment, there's simply not enough for the Court to identify what it is that the agency is alleged to have done -- how what the agency is alleged to have done has affected a concrete and particularized interest of plaintiff.

Your Honor, one brief point in addition as to the *Seila Law* decision, we are not -- plaintiffs brought up in their reply brief the counterfactual. I think that's a bit of a red herring and a misplaced argument. The government is not

demanding that plaintiffs somehow prove a counterfactual; i.e., that a different BLM director would have taken the same action. That is not the argument that we're -- we are presenting or that we have presented. So I don't think that counterfactual analysis really has any part in the Court standing inquiry here.

With respect to the *Cuccinelli and Wolf* decision that your Honor raised, I think those tend to be readily liken and readily distinguished from this case and much more readily liken to the situation in *Free Enterprise Funds* or *Seila Law* in that, as the Court pointed out, the plaintiffs in those cases were the direct object of the regulation for the government policy at issue by -- issued by the government official that was challenged in those cases.

Your Honor, unless the Court has any questions regarding standing, I would like to move on to respond to the merits argument.

THE COURT: Go ahead, please.

MR. ZEE: Your Honor, I think that there's just a fundamental misunderstanding on the part of the plaintiffs as to the nature of Mr. Pendley's service.

THE COURT: Mr. Zee.

MR. ZEE: I believe as plaintiffs recognized today, Mr. Pendley serves under a lawful delegation of authority.

THE COURT: Mr. Zee, what role does Mr. Pendley

serve?

MR. ZEE: Mr. Pendley is the Deputy Director of Policy and Planning, Your Honor. He is, pursuant to a delegation, exercising by --

THE COURT: By whom?

MR. ZEE: Of the director of the Bureau.

THE COURT: Who delegated his authority?

MR. ZEE: The current delegation of authority was ratified by that Assistant Secretary of the Department of the Interior in a May 2020 memo.

THE COURT: The Succession Memo?

MR. ZEE: That is the Succession Memo, Your Honor, yes. Prior to the Succession Memo, Mr. Pendley exercised authority pursuant to a different delegation of authority from the Secretary.

THE COURT: So the Succession Memo delegates authority to the BLM director. Is that what you are telling me?

MR. ZEE: It delegates authority to five individuals, and it creates a succession of those five -- well, I should say, five positions, Your Honor, who are -- which are occupied by individuals, and it creates a hierarchy succession of authority in the event that the director -- (video disruption.)

THE COURT: And the authority for that Succession Memo comes from where?

MR. ZEE: The authority of that Succession Memo, Your Honor, is rooted in the Reorganization Plan Number 3, which is a 1950 provision. It's Section 2 of the reorganization plan, which is a 1950 provision enacted by Congress.

THE COURT: You said that the Assistant Secretary of the Interior authorized the Succession Memo?

MR. ZEE: The Assistant Secretary of the Interior ratified and concurred --

THE COURT: Ratified?

MR. ZEE: Correct.

THE COURT: All right. And has the Assistant Secretary been nominated by the President and confirmed by the Senate?

MR. ZEE: Your Honor, I should say -- it was -- I need to back up. It was -- he has not. That position is currently occupied by a -- is not -- the duties of that position are being performed by an official who is himself operating under a delegation of authority. That's Mr. Hammond.

THE COURT: And Mr. Hammond then delegated authority to Mr. Pendley?

MR. ZEE: Correct. It's incurred in the delegation and ratified.

THE COURT: Okay.

MR. ZEE: So as I was saying, Your Honor, the plaintiffs have sought to fit this case into what we think is a

bit of square -- a round hole for a square peg, and they continue to insist that this is an FVRA case, yet we have made no attempt and do not maintain and do not intend to maintain that Mr. Pendley's service is justified by the FVRA; that he is somehow serving as the acting director under the FVRA.

Plaintiffs have attempted, I think, to argue that the incidentally erroneous marking and labeling of Mr. Pendley as the acting director somehow transmutes to actually having some legal effect under the FVRA. But I think what's crucially missing --

THE COURT: Mr. Zee.

MR. ZEE: -- from plaintiffs' argument is how -- if he is indeed serving under the FVRA -- which, again, our position is he's not -- which provision is he serving under and how -- and by which provision is he the acting director that plaintiffs continue, it appears, to maintain that Mr. Pendley did?

Our position, just to be crystal clear, Your Honor, is that FVRA really has no role to play in this case. This is -- Mr. Pendley is exercising the powers and duties of the director pursuant to a delegation. He is not the acting director of the FVRA.

THE COURT: Mr. Zee, with all due respect, sir, we're almost at the end of the presidential term, and we've never had a director of the BLM approved by the Senate. And this is all

authorized how?

MR. ZEE: This is authorized, Your Honor, by the -- well, the delegation in the first instance. We do not understand the plaintiffs' challenge to the delegation itself. That has been authorized by Congress, the Organization Plan Number 3 in 1950, the power of the Secretary to delegate authority within the department.

THE COURT: The power of the Secretary of the Interior?

MR. ZEE: Correct. And that -- correct.

THE COURT: All right. But what power has the Secretary delegated in this case?

MR. ZEE: The Secretary of the Interior has delegated -- first of all, he has delegated the power to make the delegation to the official who is performing the duties of the Assistant Secretary. And in the Succession Memo, the authority of the Secretary to control the tasks and duties of the BLM director, that's more of 43 USC 1731(a).

THE COURT: Mr. Zee.

MR. ZEE: Yes?

THE COURT: Is there any time limitation on the Succession Memo or any limitation on the scope of authority granted under the Succession Memo?

MR. ZEE: Yes, Your Honor. There is a time limitation on the Succession Memo. Plaintiffs have attempted

to characterize it as an indefinite one, but on its face -- and I can read from it. It expires, by its own terms, Your Honor, whenever there is a permanent director appointed to the director position or an official is appointed to that position pursuant to the FVRA itself. So to the extent that --

THE COURT: But that's not really a limit of time. That's just a contingency.

MR. ZEE: There is no expressed time limit on the succession order, Your Honor. But our position is that there need not be for Mr. Pendley's service or indeed any delegee's service to be constitutional. I would refer the Court to the congressional appropriation riders. Congress has spoken to this issue. These are cited in our opposition briefs in Subsection 2C, in which Congress identifies the potential for delegees to exercise authority. It sets forth not service -- not durational limit on such delegated authority, but it instead sets forth only salary restriction. The ability of a delegated official to receive a salary. And even in those circumstances where a salary prohibition would arise, Your Honor, Mr. Pendley has not met it. I think it's --

THE COURT: Mr. Zee, has any other President at any time relied upon this delegating authority and, as you discussed, the Succession Memo, to fill a vacancy set for a position --

MR. ZEE: Your Honor --

THE COURT: Hold on. Let me finish my question, please.

MR. ZEE: Sorry. I apologize.

THE COURT: -- for a position that requires a presidential appointment with Senate confirmation?

MR. ZEE: Your Honor, to be clear, the Succession Memo is not a feature of -- is not approved by the President. The President does not have a role in the succession. That's purely a creature of the Department of the Interior.

THE COURT: That wasn't my question.

MR. ZEE: I apologize.

THE COURT: Can you point to any other official in this administration or prior administrations who are serving in a position that requires a presidential appointment subject to Senate confirmation, but instead are serving pursuant to a delegated authority outlined in a Succession Memo?

MR. ZEE: I can't -- I can't today, Your Honor, point to a specific instance where there is pursuant to a Succession Memo. We have appointed, to the extent the Court would find it helpful, the service of an official in the Bureau of Alcohol, Tobacco, and Firearms, to serve as both the acting director of ATF, and then following the expiration of the relevant time limit under the statute, he served as the deputy director but exercising the function of the director for a considerable amount of time. I believe the time was approximately four

years, 2015 to 2019.

To be clear, Your Honor, that's not a -- that was not served, as I understand it, pursuant to a Succession Memo of precisely the same nature that's at issue here. But it was under a delegation of authority which is what the -- what Mr. Pendley is serving under, that is a feature of the Succession Memo.

THE COURT: As I understand, Mr. Zee, the Succession Memo designates Mr. Pendley as a first assistant. Is that correct?

MR. ZEE: That is correct, Your Honor.

THE COURT: Okay. And, again, can you give me any other examples -- you gave me the Bureau of ATF -- of a person who becomes first assistant to an office after it becomes vacant, an office that requires presidential appointment and Senate approval?

MR. ZEE: Well, I think, Your Honor, to be clear, the aspect of the Succession Memo, which designates the Deputy Director of Policy and Planning, of which Mr. Pendley is as the first assistant, that is not the delegation of authority. That is the designation of the -- of the default official under the FVRA, who in the event of a vacancy, as defined in the statute, would become the acting director. And that type of designation is relatively common throughout the federal bureaucracy.

Your Honor, I would just like to, if I may, say a few

more words about the durational issue that plaintiffs have raised. We don't think that there's simply any manageable standard by which the Court could evaluate when there is -- if there is a durational limit, when the durational limit has been met, whether it's three months, nine months, a few years, eight years. It's unclear how the Court would weigh in on a question of that nature when that is committed to by the Constitution, to the political branches explicitly. The nomination and advisory consent process is directly committed to the President and the Senate under the Appointments Clause, of course. That's the conclusion of the *Bhati* decision, Minnesota.

Further, Your Honor, the example that I eluded to early, the ATF deputy director, we don't think that Mr. Pendley's service is -- in any way approaches the highly unusual and extraordinary circumstances that plaintiffs make it out to be. He served as the -- he's been with the Bureau for slightly over one year. I believe it's approximately 14 months as of this time. He served as the director -- excuse me -- he's exercised the director function for slightly less than his time at this Bureau.

In so far as plaintiffs attempt to impose some sort of durational limit, it is not even clear what that limit or what that standard would be. They seem to suggest that it is the 210-day limit in the FVRA itself, yet I think the congressional provisions that I eluded to earlier, which

recognize the possibility of delegated service for periods of unspecified durations, are contrary.

One final point, Your Honor, I think, on the matter of political question and just separation of powers, generally, this is a matter which Congress, if it saw aggrandizement to its detriment by the Executive, is in position to address at any time and --

THE COURT: Mr. Zee, didn't Congress attempt to direct the enactment of the FVRA?

MR. ZEE: I think it's fair that the FVRA set forth a framework under which an acting official could serve, but that the FVRA in no way prohibits the arrangement that we have before us and as the Court is aware.

THE COURT: What's the difference between an acting official and a first assistant serving as a delegation? I don't see much difference. Is there?

MR. ZEE: Your Honor, I think it's -- there's a difference insofar as the acting official occupies the actual office of the director in this instance. By contrast here, Mr. Pendley -- that office remains vacant. Mr. Pendley is the deputy director. He's -- he can only exercise the powers that are -- that may be delegated to another individual. The director's power may be delegated. In the instance of an acting official, he is generally entitled to exercise all the powers of the official were he that official.

Unless Your Honor has any further questions regarding the Appointments Clause claim, I would simply urge the Court to either defer ruling on plaintiffs' expedited motion for summary judgment until we have an opportunity to present our arguments under Rule 12, as is our right, or, in the alternative, Your Honor, to deny the motion for summary judgment. Thank you.

THE COURT: Thank you, Mr. Zee. All right. Mr. Zee, if you would mute your microphone again, please. Thank you, sir.

All right. Mr. Gupta, Mr. Sawhney, I'll give you a brief rebuttal. Who is ready to go first?

MR. GUPTA: Your Honor, I can go first on standing, and I'll try to be really quick.

THE COURT: All right. Go ahead, please.

MR. GUPTA: First, Mr. Zee asked that the Court defer a ruling, but I'm a little mystified on what he's saying because, as I understand it, what he's saying is defer ruling on this motion so that we can file a Rule 12 motion that makes some other arguments that we haven't identified. But all of those arguments could have been made in opposition to summary judgment. And indeed, you know, the Justice Department typically raises standing. They've raised standing, and the threshold we have to satisfy at summary judgment under *Lujan* is higher than it would be at the Rule 12 stage. So I'm not really sure what he is saying or what basis there would be not

to rule on the summary judgment motion.

And really the Court has already granted the relief we've asked for with respect to expedition. What we wanted was a quick briefing schedule and to get a hearing and not have this drag out. In cases like this, time really is of the essence. That's reflected in the short time frames in the FVRA and of these kinds of Appointment Clause challenges. If there's no judicial relief, then the problem can simply go away and then be repeated.

And as we've pointed out in the declarations, Williams and Tubbs declarations, time really is of the essence here. Montana is subject to a process that involves a whole lot of land in Montana with serious impacts. There's an ongoing process. And Montana has to face the uncertainty of dealing with someone who doesn't have the lawful authority to supervise that process.

The second point that Mr. Zee raised is that the state is, in his view, not a plaintiff. But as Your Honor's questioning points out, the state often operates through its governor or its agencies, and that's not unusual. In the *Bullock v IRS* case, the Justice Department made a similar argument in its papers, and this Court, I think, implicitly rejected that argument and held that *Massachusetts v EPA* and its concept of special solicitude applied in that case where the plaintiffs were the governor and a state agency, and the

attorney general wasn't there.

And, as Your Honor pointed out, it's really an antecedent question of state law whether the governor has the authority to bring these cases, and the Justice Department is not challenging his authority.

Mr. Zee talked a lot about the harm from Sage-Grouse and suggested that the chain of causation is broken simply because some other agency lists the Sage-Grouse. But I think as *Massachusetts v EPA* shows, there, the chain of causation was a lot more attenuated. What you have to show, we have shown, is that these actions contribute to environmental harm to the state.

And Mr. Zee's arguments danced around the real harm, which is the harm that's reflected by this approval by Pendley of protests made by the state. He tried to distinguish the separation of powers cases by saying that in those other cases, the plaintiff was the direct target of the federal government's action. I'm kind of mystified by that argument because these plans that we're talking about are all about Montana. They reflect two field offices in Montana, and they control a huge amount of land in Montana and have direct impact for Montana. They authorized oil and gas leasing in 95 percent of the available affected land in Montana.

And so he says they are not direct targets, but we are. And he says he's not insisting on a counterfactual. But

I think by telling us that he wants us to identify some specific action that we're complaining about that causes the concrete injury, he's really insisting on the kind of counterfactual the Supreme Court said you don't need.

And, here, if you had to show the counterfactual we have it. The agency has flipped 180 degrees. It has rejected requests by the governor. And there's a direct impact on Montana's land and its wildlife, and that impact is ongoing. And so I think we've done more than enough to satisfy Article III standing on multiple alternative grounds.

And so if the Court doesn't have any further questions on standing, I'll turn it over to my colleague, Mr. Sawhney.

THE COURT: Thank you, Mr. Gupta.

Mr. Sawhney.

MR. SAWHNEY: Thanks, Your Honor. I'll be brief.

THE COURT: Mr. Sawhney, first address the government's argument that the FVRA really has no relevance to your Appointments Clause challenge.

MR. SAWHNEY: Yes, Your Honor. And I think Mr. Zee's argument there was clarifying in that, you know, I think the government has made clear that their position is that so long as they string together a series of purported delegations that give, you know, the acting official in all but name the same power as an acting official, they can completely evade the

FVRA.

And I think on this point, Your Honor, the *Cuccinelli* decision, Judge Moss's decision there, makes clear what's wrong with the government's position. And as Judge Moss stated, he said every cabinet level department has some version of a vesting and delegation statute. It was the pervasive use of those vesting and delegation statutes, along with the lack of an effective enforcement process, that convinced Congress of the need to enact the FVRA. Yet if defendants were correct that the mere existence of these delegation statutes were sufficient to negate the mechanisms Congress included in the FVRA, Congress would have done little to restore constitutionally mandated procedures that must be satisfied before acting officials may serve in positions that require Senate confirmation.

In other words, the government's argument is essentially that the FVRA and, therefore, Congress's role in appointments can be completely evaded simply by using these delegations. And that cannot be correct because it would mean that the Senate would have no role at all, ever. Frankly, the government's --

The other point I want to make is that I think Your Honor's questions to Mr. Zee illuminated the unusual and almost baffling situation we are in. Mr. Pendley is the Deputy Director of Policy and Projects, who is serving in the role of

the director exercising authority delegated to him by the Secretary, but then who has created a succession order delegating -- putting himself as first assistant in the event of a vacancy. That vacancy has persisted for the entire time of the presidential term. And then that was ratified by another acting Secretary, who also is not confirmed nor appointed in compliance with the FVRA but also is delegated authority from someone up higher in the chain.

So you have numerous officials, none of whom have been confirmed by the Senate or have complied with the FVRA, exercising the entire authority of the agency, and, in fact, even setting up how the agency should operate in the event of a vacancy without acknowledging that there has been a vacancy the entire term. And so I just don't think that this kind of, you know, absurd and circular steps can be tolerated if we want to give the Appointments Clause any real weight. And the Appointments Clause, as the Supreme Court has made clear, is not some minor or marginal clause in the Constitution. It's one of the most critical structural safeguards of our Constitution, and it delineates the power between the Executive and the Legislative branch in a way that's very important for -- you know, the Supreme Court said for individual liberty and for separation of powers.

And so I think that the position that the government has set out here, it's a bit confusing, but it boils down to

the idea that the Executive branch can, through a variety of somewhat complicated actions, just get out of the Appointments Clause. And I think that this case is perhaps the clearest example of why that can't be tolerated.

And so, you know, for those reasons we think that the motion for summary judgment should be granted.

THE COURT: Thank you, Mr. Sawhney.

Mr. Zee, I'll give you a very brief surrebuttal if you'd like.

MR. ZEE: Thank you, Your Honor. I will be very brief, two quick points. First, in response to Mr. Gupta's rebuttal about -- he again invoked the approval of the protests by the Bureau. Again, we don't know which protests, as far as I can tell, are being referred to there, nor do we know what effects that approval for non-specified protests may have had on any cognizable -- (video disruption.) To the extent that that is plaintiffs' position, we submit that they have been inadequately pled it or evinced it at summary judgment.

Second, Your Honor, briefly, Mr. Sawhney recited an argument about the delegation order and the succession order and delegation orders generally. Two quick responses, Your Honor, this does not at all carve Congress or the Senate out of the process as was argued. If Congress does not like the extent to which delegations are being used, it can restrict the authority of the Executive branch to delegate authority in

whatever matter it sees fit, subject to whatever Article II powers exist in that area.

Second, very briefly, to the extent that plaintiffs wish to actually challenge the succession order as an unlawful delegation, that also needs to be pled. My reading of the papers, Your Honor, is that's really first brought up in the reply on summary judgment and during today's argument. To the extent that plaintiffs wish to challenge that, they can attempt to plead it.

Thank you, Your Honor.

THE COURT: All right. Thank you, Mr. Zee.

Thank you, Counsel. This matter is submitted. I will issue an order forthwith. Thank you for your time today.

MR. SAWHNEY: Thank you, Your Honor.

MR. GUPTA: Thank you, Your Honor.

MR. ZEE: Thank you.

(The proceedings concluded at 2:49 p.m.)

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REPORTER'S CERTIFICATE

I, Yvette Heinze, a Registered Professional Reporter and Certified Shorthand Reporter, certify that the foregoing transcript is a true and correct record of the proceedings given at the time and place hereinbefore mentioned; that the proceedings were reported by me in machine shorthand and thereafter reduced to typewriting using computer-assisted transcription; that after being reduced to typewriting, a certified copy of this transcript will be filed electronically with the Court.

I further certify that I am not attorney for, nor employed by, nor related to any of the parties or attorneys to this action, nor financially interested in this action.

IN WITNESS WHEREOF, I have set my hand at Great Falls, Montana, this 5th day of February, 2021.

/s/ *Yvette Heinze*

Yvette Heinze
United States Court Reporter